

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EUGENE MURPHY)	
Claimant)	
)	
VS.)	
)	
TOPEKA METAL SPECIALTIES INC.)	
INTEGRITY CORPORATION)	
Respondents)	Docket No. 258,856
)	
AND)	
)	
TRAVELERS INSURANCE CO.)	
SAFECO INS. CO. OF AMERICA)	
FIREMAN'S FUND INSURANCE CO.)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurance Carriers)	

ORDER

Respondent and Safeco Insurance Company request review of a preliminary hearing Order entered by Administrative Law Judge Brad E. Avery on February 12, 2001.

ISSUES

The respondent, Topeka Metal Specialties, Inc. and its insurance carrier, Safeco, raised the following issues: (1) Whether the claimant met with personal injury by accident, as alleged; (2) If the claimant met with personal injury by accident, whether the date of accident was correctly determined to be April 30, 2000; (3) Whether the claimant's alleged accidental injury arose out of and in the course of his employment; (4) Whether timely notice was given by the claimant; and, (5) Whether written claim was timely filed by the claimant. In its brief, respondent Topeka Metal Specialties, Inc. and its insurance carrier, Safeco, noted that the issue of whether written claim was timely filed is not raised or briefed and will be considered abandoned.

The respondent Integrity Corporation filed a brief limited to the issues of whether the claimant met his burden of proof to establish injury to his shoulder at his current employer,

Integrity, or his previous employment with Topeka Metal Specialties and whether the claimant gave timely notice of his accident.

The respondent Integrity Corporation's insurance carrier, Fireman's Fund Insurance Co., filed a brief which addressed the following issues: (1) Whether the claimant met with personal injury by accident; (2) Whether the claimant's alleged accidental injury arose out of and in the course of his employment; (3) Whether the date of accident was correctly determined to be April 30, 2000; and, (4) Whether proper notice was given.

The respondent Integrity Corporation's insurance carrier, Travelers Insurance Company, filed a reply which noted that Travelers provided the respondent coverage for October 1, 1998 until October 1, 1999, and that there was no event alleged by the claimant which would result in a finding of accidental injury during this period of coverage.

The claimant requests affirmation of the Administrative Law Judge's Award and additionally notes that determination of the date of accident is not a proper subject for review from a preliminary hearing.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant has alleged repetitive use injuries to his shoulders, upper extremities and right middle finger through the date of September 5, 2000, and particularly due to his activities as a painter through June 2000.

The claimant was hired by Topeka Metal Specialties in December 1996 and began his job duties as a painter after a few months work as a laborer. Claimant testified that in approximately 1999 all Topeka Metal Specialties' employees became Integrity Corporation's employees. Claimant was advised at a meeting with the other employees that the change was made for workers compensation reasons. The claimant's job remained the same in all respects.

The claimant's job duties while a painter consisted of using a spray gun attached to an air hose to paint parts hanging from a line. The line moved at a rate of about 10 feet per minute and the parts were at claimant's eye level or higher. The spray gun weighed about ten pounds and the claimant would hold it with one hand until it started to hurt and then he would hold it with the other hand.

Before his employment with Topeka Metal Specialties, the claimant had bilateral carpal tunnel surgery. In addition, the claimant had sustained injuries to his shoulders while employed at BRB Construction. Because of these earlier injuries to his shoulders,

the claimant had right shoulder surgery on January 7, 1998, and left shoulder surgery on January 15, 1999. Both of these surgeries to the shoulders occurred while claimant was working for respondent. The claimant testified that the earlier injuries were to the top of his shoulders and his current complaints are to the back of his shoulders as well as the shoulder joint.

After the shoulder surgeries, the claimant saw Dr. Bieri in February 2000, in connection with his prior injury. During that visit the claimant advised the doctor that all of his shoulder complaints related back to his 1995 injury. However, the claimant explained that he did not advise the doctor of his new shoulder complaints because they were unrelated to the portion of the shoulder injured in the prior accident.

The claimant's uncontradicted testimony was that on numerous occasions he told his supervisor, Brad Vallis, that he was having problems with his shoulders. The claimant testified that his supervisor advised him to go to his own doctor. The claimant testified that his personal physician would not see him because it appeared the injury was work related. The claimant also discussed his shoulder problems with Dr. Beard at an office visit on June 8, 2000.

The claimant began treatment with Dr. Beard in August 1999, with complaints of pain in his hands. Over the course of treatment the pain complaints included the hands, wrists and upper extremities. On April 19, 2000, Dr. Beard performed a right long finger trigger release. On April 28, 2000, the claimant was released to temporary alternate duty with restrictions to his right hand against repetitive activities and no lifting over 20 pounds. In addition, claimant was restricted from using a sprayer for two weeks. On May 10, 2000, the claimant was released to return to his regular duties with no restrictions. At a follow-up visit with the doctor on June 8, 2000, the claimant noted he was having shoulder discomfort.

The respondent moved the claimant from his painting work to a lighter duty job in the tool room. The claimant testified that work in the tool room commenced May 1, 2000.¹

The respondent argues that the claimant failed to give timely notice of his accident to his shoulders. The sole evidence in this respect is the claimant's uncontroverted testimony that on numerous occasions he advised his supervisor, Brad Vallis, of the problems that he was having with his shoulders.² Mr. Vallis did not testify in this matter. Uncontroverted evidence, which is not improbable or unreasonable, may not be discarded

¹Preliminary Hearing, February 9, 2001; pp. 50,52,64-65.

²Preliminary Hearing, February 9, 2001; p. 14.

unless it is shown to be untrustworthy.³ The claimant has met his burden of proof that he timely notified his employer of his ongoing accidental injuries to his shoulders.

Respondent contends that claimant did not sustain injury to his shoulders as evidenced by the lack of contemporaneous complaints to the doctors he saw during the time frames he was alleging shoulder problems. Initially, respondent points to the claimant's comments made to Dr. Bieri during the examination in February 2000, that all his shoulder problems related to the prior incident that resulted in the shoulder surgeries. However, the claimant testified that he did not mention the new problems because the doctor was only examining him in regard to the prior accidental injuries and surgeries. The claimant further noted that he talked to Dr. Beard regarding his shoulder problems and Dr. Beard thought it was a thoracic outlet problem. The reference to thoracic outlet syndrome is confirmed by Dr. Beard's office note dated December 15, 1999.

The claimant's uncontroverted testimony was that he advised his supervisor of shoulder problems while performing his painting job duties. In addition, the claimant has identified the pain in his shoulder as being in different locations than the sites of his previous shoulder operations. The claimant has met his burden of proof to establish work-related injury to his shoulders as well as his hand, wrist and upper extremity complaints.

Lastly, it is contended that the Administrative Law Judge incorrectly determined the date of accident.

Initially, it should be noted that the claimant contends the date of accident is not a jurisdictional issue subject to review by the board from a preliminary hearing. In an appeal from a preliminary hearing order, the date of accident will not be a jurisdictional issue if it only determines which of two or more insurance carriers had coverage at the time of the accident. Date of accident becomes jurisdictional, however, if it determines which employer was claimant's employer at the time of the accident because the issue is, then, whether the injury arose out of and in the course of employment for the respondent. Whether the injury arose out of a particular employment is a jurisdictional issue under K.S.A. 44-534a. The issue concerning which of two respondents is liable for benefits is therefore jurisdictional.

The record is not clear as to when the ownership of respondent changed, but counsel for respondent, Integrity Corporation, raised as an issue whether the accidental injury occurred during claimant's employment with Topeka Metal Specialties Inc. or during employment with Integrity Corporation. Although this matter was litigated as if there was a single employer, nonetheless, the respondent Integrity Corporation does raise in its brief the issue whether claimant suffered injury after the employer changed from Topeka Metal Specialties, Inc. to Integrity Corporation. The Board, therefore, will address the date of accident issue.

³See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

The evidence regarding the date of accident consists of the claimant's testimony that he began to experience problems with his shoulders while painting as early as June 1999. During this time frame the claimant was primarily receiving treatment for complaints to his fingers, wrists and upper extremities. However, the claimant detailed that the painting activities caused his shoulder pain and he further testified that he was transferred to the less demanding job in the tool room effective May 1, 2000. Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a micro-trauma case is the last day the claimant performed the earlier work tasks.⁴ As a result, the Administrative Law Judge correctly concluded that the date of accident, for claimant's cumulative trauma complaints to the shoulder, would be April 30, 2000, which was the last day he performed the painting job duties.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated February 12, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2001.

BOARD MEMBER

pc: John J. Bryan, Claimant's Attorney, Topeka, KS
John F. Carpinelli, Respondent/Travelers' Attorney, Topeka, KS
Wade A. Dorothy, Respondent/Safeco's Attorney, Lenexa, KS
Joseph C. McMillan, Respondent/Fireman's Fund's Attorney, Kansas City, MO
James C. Wright, Integrity/Liberty Mutual's Attorney, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁴ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).